CASE NO. 83-2111

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

JOHN W. VICORY,

Petitioner,

vs.

ROBERT R. WALTON, Sheriff
of Butler County, Ohio, and
JOHN F. HOLCOMB, Prosecuting Attorney
of Butler County, Ohio,

Respondents,

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED

I. Where the claimant has failed to plead or prove that available alternative state remedies are inadequate to redress the claimed wrong of lost rental value of property, does *Parratt* v. *Taylor,* 451 U.S. 527 (1981), mandate the dismissal of such an action brought under 42 U.S.C. § 1983 for lost rentals plus attorney fees?

II. Where a state prosecuting attorney and county sheriff are acting in their quasi-judicial capacity within the scope of official duties in a homicide prosecution, are they entitled to absolute immunity from liability for damages claimed under 42 U.S.C. § 1983 for their actions in connection with the initiation and preparation of such criminal prosecution?

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Respondents, Robert R. Walton and John F. Holcomb, pray that a petition for a writ of certiorari herein be denied.

STATEMENT OF THE CASE

Petitioner John W. Vicory owned a mobile home trailer at 2165 Jackson Road in St. Clair Township, Butler County, Ohio, where a triple homicide occurred on October 1, 1979. The deaths of Ralph D. Wright, John Russo, and Gayle Mize were inflicted by gunshot wounds, severe beating and stabbing, all of which took place in every room of the trailer. Petitioner Vicory had rented this trailer to victim Wright.

Upon discovery of this crime, Respondents John F. Holcomb and Robert R. Walton, the prosecuting attorney and sheriff, respectively, of Butler County, Ohio, conducted an investigation at the trailer; the county coroner, Dr. Garret J. Boone, had ordered the trailer sealed in order to preserve the scene for evidentiary purposes in case the trial judge should order a view of it in the criminal trial of a suspect, Richard E. Saylor, who was arrested the same evening of the crime. Upon the coroner's order and the request of Prosecuting Attorney Holcomb, and with the consent of Petitioner Vicory, Respondent Sheriff Walton directed his deputies to seize and secure the trailer as an intact crime scene, pending the forthcoming trial.

Extended criminal proceedings were conducted against Richard E. Saylor, in which he entered pleas of not guilty and not guilty by reason of insanity to three counts of murder; delays were entailed by the necessary mental status examinations of Saylor and by a motion for a continuance by the defense. Defense counsel upon their demand were permitted to view the secured crime scene at the trailer for purposes of their trial preparation, and a motion for jury view of the scene was also made. When the case was brought to trial on March 10, 1980, Saylor entered an unanticipated guilty plea to all three counts of murder, as he was charged. At no time had plea bargaining in the case been discussed, and neither the prosecuting attorney nor the sheriff knew that there would be a guilty plea on the trial date of March 10, 1980, until that date.

Two weeks later on March 24, 1980, after Petitioner Vicory requested the return of the trailer, Respondent Holcomb advised Respondent Walton that it was no longer necessary to retain the trailer as evidence, and the trailer was immediately returned to Vicory's possession.

Without attention to any state remedy available in replevin, forcible entry and detainer, or small claims court procedures, Petitioner Vicory filed this action under 42 U.S.C. § 1983 for lost rental value of the trailer for the five-month retention period and for attorneys fees; the original complaint was against the sheriff, Respondent Walton, and by amended complaint the prosecuting attorney, Respondent Holcomb, was also joined. On October 27, 1982, the United States District Court for the Southern District of Ohio granted a summary judgment for Petitioner Vicory in the amount of $850, the stipulated lost rental value of the trailer, plus attorneys fees to be later determined.

On November 30, 1983, on appeal to the Court of Appeals for the Sixth Circuit, a majority of that court reversed and held that under the authority of *Parratt* v. *Taylor,* 451 U.S. 527 (1981), in Section 1983 actions for damages claimed for an alleged deprivation of property without due process, the plaintiff must plead and prove that available alternative state remedies are inadequate to redress the claimed wrong. (*Vicory* v. *Walton,* 721 F. 2d 1062 (6th Cir. 1983), at pages 1063-1066.) A concurring opinion strongly stated the position that the prosecuting attorney was absolutely immune from damages liability under 42 U.S.C. § 1983 where he was acting within the scope of his quasi-judicial office to prepare a criminal prosecution and preserve evidentiary matters; the concurring opinion further held that the sheriff, who was performing a ministerial function as directed by the prosecuting attorney, accordingly shares in the latter's quasi-judicial immunity. (*See* concurring opinion, Bertelsman, J., 721 F. 2d at pages 1066-1067).

On March 28, 1984, Petitioner's application for rehearing *en banc* was denied, the court holding that Petitioner's

further arguments based on the Fifth Amendment were not well taken for the reason that neither the prosecuting attorney nor the sheriff had the power of eminent domain and could not be held liable, as individuals, for a "taking" of property within the purview of the Fifth Amendment.

The petition for writ of certiorari followed in this Court on June 21, 1984.

REASONS WHY THE WRIT SHOULD BE DENIED

I. Parratt v. Taylor, 451 U.S. 527 (1981), mandates the dismissal of an action brought under 42 U.S.C. § 1983 for lost rental value of property, grounded upon an alleged procedural due process deprivation, where the claimant fails to either plea or prove that the available alternative state remedies are inadequate to redress the claimed wrong.

In the case of *Parratt* v. *Taylor,* 451 U.S. 527 (1981), this Court has significantly defined the range of claims which can be recognized under 42 U.S.C. § 1983 for alleged deprivations of property by state officers by a claimed failure of procedural due process.

In the *Parratt* case, a twenty-three dollar hobby kit which had been ordered by a state prisoner was negligently lost by prison officials; the prisoner alleged that he had been deprived of property without due process of law in violation of his Fourteenth Amendment rights. This Court denied the claim, holding that the loss of the hobby materials did not raise a procedural due process claim. *Parratt* at 543. The Due Process Clause had not been violated, even though the conduct of prison officials satisfied the "under color of state law" requirement, the materials were "property," and the

loss of materials amounted to a "deprivation," because the prisoner had an avenue of redress in the form of state tort law. Since the prisoner could have brought a state tort action, this state remedy is sufficient to satisfy the requirements of due process. *Parratt* at 537-543. Thus, a meaningful post-deprivation remedy provided by a state for a deprivation of property satisfied procedural due process if pre-deprivation procedures relating to the deprivation are impractical. Pre-deprivation procedures usually are impractical when the deprivation is an isolated event, the occurrence of which is difficult to predict. *Parratt* at 541.

In the case at bar, the triple homicide that occurred in Petitioner's trailer was an isolated event, impossible to predict; any deprivation procedure would have been totally impractical. Moreover, any discussion of state pre-deprivation procedures is moot for the reason that Petitioner consented to the initial seizure of the trailer by Respondents, and in the District Court it was stipulated that "the seizure of [Petitioner's] trailer for the purpose of conducting said investigation is a proper exercise of authority of the State and is lawful [*sic*]." Thus, the only proper inquiry herein is directed to whether Ohio's available post-deprivation remedies were available to Petitioner for the recovery of lost rentals in the stipulated amount of $850.00.

A significant lower court decision is *Toins* v. *Ignash*, 534 F. Supp. 452 (E.D. Mich. 1982), which interpreted *Parratt* to "reflec[t] a concern that Section 1983 has become a constitutional catch-all for a grab bag of tort violations that happen to be committed under color of state law." *Id.* at 455. This concern was also articulated in *Paul* v. *Davis*, 424 U.S. 693 (1976), where the Court cautioned against making the Fourteenth Amendment "a font of tort law to be superimposed upon whatever systems may al-

ready be administered by the state," *id.* at 701. Thus, *Parratt* has been reasonably and correctly interpreted by the lower courts as establishing an exhaustion doctrine in § 1983 actions with respect to state actions. *Toins, id.* at 455.

In the case at bar, Petitioner Vicory has completely failed to establish in his action under Section 1983 a violation of the Due Process Clause of the Fourteenth Amendment. Petitioner, like the prisoners in both *Parratt* and *Toins,* has tried to circumvent the appropriate post-deprivation state law remedies available and make the Fourteenth Amendment "a font of tort law to be superimposed" on the existing state law system. Indeed, Petitioner ignored the alternative state law post-deprivation remedies, such as replevin,[1] forcible entry and detainer,[2] or even a simple suit for money damages in small claims court.[3] Since the state has provided Petitioner several meaningful post-deprivation remedies, which he chose to circumvent in favor of a federal action on strained constitutional grounds, *Parratt* requires the dismissal of this action for a failure to show that state remedies were adequate and appropriate to fully compensate Petitioner for his lost trailer rentals.

Petitioner has also raised the issue of a Fifth Amendment "taking" without just compensation as a basis for his action under U.S.C. § 1983. The Sixth Circuit, in its Order Denying Petition for Rehearing En Banc at 2, considered and rejected this argument:

> The "taking" clause of the fifth amendment has commonly been viewed as a limitation on government.

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[1] Ohio Revised Code, Section 1901.18(A).

[2] Ohio Revised Code, Chapter 1923.

[3] Ohio Revised Code, Chapter 1925.

> Here the plaintiff has sued not the government but two individuals for damages in connection with the detention of property. . . . Unlike a trespass or other property torts which may be committeed by either an individual under or not under color of law or by a governmental entity, a "taking without just compensation" in violation of the fifth amendment is an act or wrong committed by a government body – a taking "for public use." (citations omitted) Plaintiff may not maintain a constitutional cause of action against these defendants who neither have or claim to have the eminent domain power, nor any power similar to it.

Thus, the Petitioner cannot maintain a 1983 action against two individual defendants who neither have nor claim eminent domain power since an individual cannot commit and be liable for damages for a "taking" under the Fifth Amendment.

II. A state prosecuting attorney and county sheriff are entitled to absolute immunity from liability for damages claimed under 42 U.S.C. § 1983 in connection with their actions regarding the initiation and preparation of a criminal prosecution, such actions being within the scope of the prosecuting attorney's quasi-judicial duties.

In *Imbler* v. *Pachtman,* 424 U.S. 409 (1976), this Court reaffirmed the longstanding rule that a prosecutor is absolutely immune from state or federal civil suits for damages where the prosecutor was engaged in his quasi-judicial capacity. *Imbler* held that public policy dictates that prosecutors remain immune because of the court's "concern that harassment by unfounded litigation would cause a deflec-

tion of the prosecutor's energies, and the possibility that he would shade his decision instead of exercising the independence of judgment required by his public trust." *Id.* at 423.

The Court acknowledged the possibility of adverse consequences to the individual's rights by granting prosecutors such immunity to § 1983 actions. However, the Court determined that these rights are outweighed by the broader public interest at stake:

> To be sure, this immunity does leave the genuinely wronged defendant without civil redress against a prosecutor whose malicious or dishonest action deprives him of liberty. But the alternative of qualifying a prosecutor's immunity would disserve the broader public interest. It would prevent the vigorous and fearless performance of the prosecutor's duty that is essential to the proper functioning of the criminal justice system. *Imbler* at 427, 428.

The *Imbler* Court stresses the adverse effect that allowing the prosecutor only qualified immunity would have on the criminal justice system. The goal of accurately determining guilt or innocence requires that the prosecutor be given wide discretion in the conduct of trial and in the presentation of evidence. If prosecutors were hampered in the exercise of their judgment, by concern over their own liability, triers of fact would be denied relevant evidence. *Imbler* at 426.

It is clear by the District Court stipulation that Respondent Holcomb was acting fully within the scope of his quasi-judicial role of initiating and conducting a prosecution for three murders, acting in the interest of the State of Ohio to present the state's case as an advocate. *Imbler, id.,* 424 U.S. at page 430, footnote 33, specifically

mentions that an advocate's role "may require the obtaining . . . of evidence." Ohio Revised Code Section 309.08, outlining the powers and duties of the prosecuting attorney, *inter alia,* to "inquire into the commission of crimes," certainly includes the action taken here to preserve and maintain the crime scene for the use in the conduct of a criminal trial.

The concurring opinion of Judge Bertelsman in the court below relied on the principles enunciated by the Supreme Court in *Imbler* in deciding the instant case. The Respondent prosecutor was absolutely immune from liability for damages since all of his acts were well within the scope of his duties in prosecuting a criminal case. The Respondent Sheriff, having performed a ministerial function at the direction of the prosecutor, shared that immunity. See *Timson* v. *Wright,* 532 F. 2d 552, 553 (6th Cir. 1976), and cases cited therein; *Denman* v. *Leedy,* 479 F. 2d 1097, 1098 (6th Cir. 1973). Therefore, Respondents are not liable individually under 42 U.S.C. § 1983 for damages in the case at bar.

CONCLUSION

Because the decision of the Court below is consistent with the applicable decisions of this Court, Petitioner Vicory's application for certiorari should be denied.

Respectfully submitted,

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